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IN THE

Supreme Court of the United States

COMMITTEE FOR ENVIRONMENTALLY SOUND DEVELOPMENT, INC., NORTH RIVER COMMUNITY ENVIRONMENTAL REVIEW BOARD, WEST VILLAGE COMMITTEE, COALITION FOR A LIVABLE WEST SIDE, GEORGIO CAVAGLIERI, JOHN L. BUNCH, JR., PHYLLIS GUNTHER, HARRIET WEISSBERGER and OLIVE FREUD,

Petitioners,

v.

THE CITY OF NEW YORK, RUDOLPH GIULIANI, as Mayor of The City of New York, THE METROPOLITAN TRANSPORTATION AGENCY and TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

CRAIG P. MURPHY
Counsel of Record
JAMES J. PERICONI
JOHN D. HOLDEN
WINDELS MARX LANE
& MITTENDORF, LLP
Attorneys for Petitioners
156 West 56th Street
New York, New York 10019
(212) 237-1000

159557

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

43pp

QUESTIONS PRESENTED

1. Whether the lower court erred in denying plaintiffs the opportunity to file a proposed second amended complaint, by prejudging the substantive merits of the amended claims, rather than their facial adequacy, in violation of the relaxed pleading standard of *Conley v. Gibson* and Rule 12, thereby subverting the fundamental concept of notice pleading.

2. Whether the lower court erred in failing to provide proper *de novo* review of the facial adequacy of the proposed amended claims, by stubbornly failing to recognize intervening changes in the underlying facts and law, despite repeated notice of these changes.

3. Whether the lower court improperly limited the scope of citizen suits, by erroneously affirming the district court's finding that Section 4.4 of New York's 1992 Clean Air Act plan for carbon monoxide does not contain a "specific strategy" as required, when an intervening change of fact and law made the Fourth Claim clearly adequate.

STATEMENT PURSUANT TO RULE 29.6

Petitioner, Committee for Environmentally Sound Development, Inc., has no parent company and does not issue stock.

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Petitioners respectfully seek a writ of certiorari to review the judgment of the Second Circuit Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Second Circuit is unpublished (*Committee for Environmentally Sound Development, Inc., et al. v. The City of New York, et al.*, No. 99-7403 (2d Cir. Dec. 21, 1999)), but can be found at Appendix A ("App. A"). The district court opinion is also unpublished (*Committee for Environmentally Sound Development, Inc., et al. v. The City of New York, et al.*, No. 98 Civ. 272 (S.D.N.Y. Dec. 1, 1998)), but can be found at Appendix B ("App. B").

STATEMENT OF JURISDICTION

The judgment of the Second Circuit Court of Appeals was entered on December 21, 1999. The Court of Appeals entered an order denying a timely petition for panel rehearing on February 11, 2000 ("App. C").

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The primary statutes involved in this case are the federal Clean Air Act ("CAA"), 42 U.S.C. §§ 7401 *et seq.*, specifically § 7604, the CAA citizen suit provision; Federal Rules of Civil Procedure 12(b)(6) and 15(a); and the 1992 New York State Carbon Monoxide State Implementation Plan ("1992 CO SIP"). The relevant portions of these provisions can be found at App. D.

STATEMENT OF THE CASE

This case concerns the proposed redevelopment of the area currently occupied by the New York Coliseum, located on the "superblock" bounded by West 58th Street, West 60th Street, Ninth Avenue and Columbus Circle in New York City. Plaintiffs are individuals, and community organizations representing individuals, who allege that they will be adversely impacted by alleged increases in carbon monoxide ("CO") levels caused by, or in the vicinity of, this redevelopment project, which includes two 750 foot towers rising from a base of 2.5 million square feet; a 650,000 square foot commercial condominium; world headquarters of Time Warner; 325,000 square feet of retail space; 325 condominium units; a 425 room hotel, and other amenities.

The Clean Air Act ("CAA"), 42 U.S.C. § § 7401 *et seq.*, requires the United States Environmental Protection Agency ("EPA") to promulgate national ambient air quality standards ("NAAQS") for various pollutants. Each State then determines how to achieve and maintain these standards by devising a State Implementation Plan ("SIP"). *See* 42 U.S.C. § 7410. The citizen suit provision of the CAA creates a private right of action to enforce the Act's provisions. A citizen may bring a suit to enforce, *inter alia*, a specific provision of an applicable SIP. *See* 42 U.S.C. § 7604; *see also Wilder v. Thomas*, 854 F.2d 605, 613 (2d Cir. 1988), *cert. denied*, 489 U.S. 1053 (1989). New York State's current CO SIP was promulgated in 1992 and replaced a SIP promulgated in 1984. The 1992 SIP specified, at that time, the use of environmental impact statements ("EISs") to evaluate projects that may significantly impact air quality, *see Coalition Against Columbus Ctr. v. City of New York*, 967 F.2d 764, 767 (2d Cir. 1992); and provided for a broader

procedure for evaluating potential CO exceedances, or "hot spots," to be "triggered by a request from New York State for redesignation of New York City" as having reached attainment of the CO standard. App. B at 12a-14a.

Petitioners filed their complaint in January 1998 alleging violations of the CAA and a New York City land use provision, N.Y. City Charter § 197-c, based upon alleged exceedances of the CO NAAQS ("CO standard") in the vicinity of the site that would be caused or exacerbated by vehicular traffic to and from this huge redevelopment project. An amended complaint followed in February 1998. In an unpublished opinion and order, the district court concluded pursuant to Fed. R. Civ. P. 12(b)(6) that plaintiffs had failed to state a federal claim upon which relief could be granted, and therefore declined to exercise supplemental jurisdiction over the state law claims. The court permitted petitioners to submit a proposed amended complaint that "should identify, separately, each specific strategy or commitment in New York's SIP alleged to be violated and describe," with "some particularity," how the City's compliance with the provision was deficient. Thereafter, the Court would decide whether leave to amend should be granted.

In December 1998, petitioners filed a proposed amended complaint identifying defendants' violations of sections 4.0(2) and 4.4 of the 1992 SIP. As to the latter, Section 4.4 of the 1992 SIP declares in relevant part that:

> The State and City commit to develop a *broader alternative procedure* to identify potential areas at risk of exceedance of the CO standard, *taking into account a wider database, consistent with all relevant methodologies, including: modeling,*

> *data collection and growth projection.* This new procedure will become part of the CO Maintenance Plan which must be submitted at the time that the State requests redesignation of the nonattainment area as an area which has attained the NAAQS for CO.

App. A at 5a (emphases added).

In an unpublished opinion and order dated March 9, 1999, App. B, the district court denied plaintiffs leave to amend their complaint, concluding that the proposed amendments did not state a claim upon which relief could be granted. As for § 4.4, the court held, *inter alia*, that the City's obligation under the Section to develop "a broader alternative procedure to identify potential areas at risk of exceedance of the CO standard" is "a future one, which is triggered by a request from New York State for redesignation of New York City" as in attainment for CO. Petitioners could not and did not allege that the "triggering" had even occurred. App. B at 14a. The court accordingly denied petitioners' motion to amend their complaint and dismissed the case.

After all briefing in the Second Circuit was complete, counsel for non-City defendants brought to the Second Circuit's attention the filing by the State of "New York State Implementation Plan: Carbon Monoxide Redesignation Request and Maintenance Plan for the New York Metropolitan Area," dated August, 1999 ("CO Redesignation Request"), by letter dated September 29, 1999, filed pursuant to Fed. Rule of Appellate Proc. 28(j), attaching thereto a copy of the CO Redesignation Request.

At oral argument on the appeal, petitioners reminded the court about the State's recent, post-briefing filing of the CO Redesignation Request. Petitioners argued that the Redesignation Request "triggered" the broader procedure for evaluation of potential CO hot spots upon study of traffic data collection and growth projections. Thus, the City's blind acceptance of the project proponent's EIS, lacking such information, was no longer legally sufficient because the "broader alternative procedure" of identification of "potential areas at risk of exceedance of the CO standard" was in effect. Thus, the district court's then correct finding that such a broader procedure was *not* then in effect, because it could only be "triggered by a request from New York State for redesignation of New York City as a 'nonattainment' area,' " had become incorrect due to subsequent events.

After summarizing the district court's opinion, the Court of Appeals noted in its decision following oral argument that the appropriate standard in its review of the dismissal is "as if the amended complaint had been filed and then subjected to review under Fed. R. Civ. P. 12(b)(6)," citing *Wilder*, 854 F.2d at 613. The reviewing court further noted the standard that "a district court's dismissal of a complaint pursuant to Rule 12(b)(6) is reviewed *de novo*," citing *Sykes v. James*, 13 F.3d 515, 518-19 (2d Cir. 1993). Despite the intervening event brought to the Court's attention prior to its decision, the court concluded that it "agree[s] with the judgment of the district court *for substantially the same reasons* stated in its opinion and summarized above," which included the absence of the "triggering event" (emphasis added). Without further discussion on those subjects, the court then discussed

1. The Court reproduced the district court's error, using "nonattainment," where the State's request was to be redesignated from nonattainment to "attainment" status.

two arguments raised by petitioners but not addressed by the district court.

On its petition for panel rehearing, which was denied, petitioners again stressed the importance of this intervening change -- the CO Redesignation Request as the "triggering event" of the broader procedure for evaluating CO hot spots — that occurred after briefing was completed.

In that Redesignation Request, just as it had bound itself in the 1992 SIP, the State declared the City would have to take all the steps of the broader procedure — including undertaking traffic studies and reviewing predicted growth indicators — which resembled the predictions for the broader procedure as envisioned in the 1992 CO SIP.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court of Appeals' dramatic departure from this Court's clear directives regarding relaxed pleading standards, liberal grant of amendments to pleadings and *de novo* review of complaints form a three-pronged assault on this Court's established fundamental procedural rules protecting litigants. The lower court's grievous errors are particularly devastating to environmental citizen suit plaintiffs challenging New York's most powerful economic and political interests, as in this case — Time-Warner, along with one of the City's most aggressive developers, strongly backed by Mayor Rudolph Giuliani and a $360 million price tag. Citizen plaintiffs' ability to make such challenges have already been limited by this Court's more sharply drawn rules on standing and mootness in recent years. Failure of this Court to reverse in this case would convince citizen suit plaintiffs of this Court's indifference to their concerns.

Here, at the same time that the City and State of New York ardently back the development project under challenge here, they have since 1992 been bound by federal law to employ a "broader alternative procedure," namely, a whole new panoply of detailed studies to identify carbon monoxide hot spots starting in August 1999. This significant and dispositive change in federal law, in effect prior to the lower court's decision, should have dispelled any remaining doubts about the facial adequacy of petitioners' proposed amended complaint. The interests of justice now mandate reversal of the district court's dismissal of the complaint.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS IS IN GROSS CONFLICT WITH RELEVANT DECISIONS OF THIS COURT MANDATING RELAXED PLEADING STANDARDS, LIBERALLY GRANTED AMENDMENTS TO COMPLAINTS, AND *DE NOVO* REVIEW BY APPEALS COURTS OF THE ADEQUACY OF COMPLAINTS. (Questions 1 and 2)

The Court of Appeals erred in denying plaintiffs the opportunity to file a proposed second amended complaint, by prejudging the substantive merits of the amended claims, rather than their facial adequacy, in violation of the relaxed pleading standard of *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), and Rule 12, Fed. R. of Civ. P. Moreover, the Court of Appeals' refusal to allow amendment of the complaint subverts this Court's long-standing directives regarding liberal leave to amend complaints (Fed. R. Civ. P. 15(a)),

and a reluctance to grant motions to dismiss for failure to state a claim upon which relief can be granted (Fed. R. Civ. P. 12(b)(6)). In addition, petitioners were entitled to a true *de novo* review of the facial adequacy of their proposed amended complaint, especially the Fourth Claim, given the supervening change in the underlying facts — namely, the triggering of the imposition of a federal mandate applying a broader procedure for review of the potential of proposed projects to cause CO hot spots.

There was ample evidence upon which to allow petitioners to amend their complaint and develop their case on the merits. This denial has deprived petitioners of the proper protection that this Court has accorded those rules.

A.

Rule 15(a) of the Federal Rules of Civil Procedure provides that when leave of court is required to amend a complaint, such "leave shall be freely given when justice so requires." Fed. R. Civ. P. 15. This Court has held that "[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Foman v. Davis*, 371 U.S. 178, 182 (1962). Courts have exercised a pervasive liberality in allowing amendment under Rule 15(a), in recognition of the axiomatic principle that "controversies should be decided on merits whenever practicable." *United States v. New York*, 82 FRD 2 (N.D.N.Y. 1978); *see, e.g., Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964).

Here the question of leave to amend is guided by the standards of Federal Rule of Civil Procedure 12(b)(6) ("Rule

12(b)(6)"). This rule allows parties to move for dismissal of a complaint when that complaint fails to state a claim upon which relief can be granted. Rule 12(b)(6). This Court has directed that "a complaint should not be dismissed [on this basis] unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. at 45-46. This Court has further cautioned that an inquiry under Rule 12(b)(6) is a limited one because the decision is made "before the reception of any evidence either by affidavit or admissions." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). Thus, "[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." *Scheuer*, 416 U.S. at 236.

Liberal leave to amend complaints and reluctance to grant motions to dismiss for failure to state a claim are closely intertwined doctrines. They are both a direct reflection of the tenet that parties should be permitted to present their claims on the merits and not upon a mere notice pleading. This is a concept fundamental to our system of justice. "[T]he purpose of pleading is to facilitate a proper decision on the merits." *Conley v. Gibson*, 355 U.S. at 48.

Because the "triggering event" for the broader procedure for identification of CO hot spots had taken place, and was brought to the Court of Appeals' attention prior to its decision, petitioners were entitled to develop evidence in discovery to demonstrate that the City had failed to take the steps required in the broader alternative procedure for CO hot spot identification, and offer it in support of their Fourth Claim. Plaintiffs should have been permitted to do so even

if it "appear[ed] on the face of the pleading that a recovery is very remote and unlikely," for "that is not the test." *Scheuer*, 416 U.S. at 236.

Accordingly, the lower court's decision undermines this Court's clear directive regarding liberal pleading and reluctance to dismiss complaints, something that is particularly important in citizen suits, where important societal concerns are at stake.[2]

B.

The Court of Appeals also grievously erred in failing to provide proper *de novo* review of the facial adequacy of the proposed amended complaint, given the intervening change in the underlying facts and law, namely, the Redesignation Request that triggered an expanded procedure to identify potential CO hot spots. Like this Court's relaxed pleading standard and liberal amendment of complaint standard, *de novo* review gives plaintiffs a second bite at the apple and requires a reexamination by the appeals court of the adequacy of the complaint, especially in a citizen suit, as if the complaint had in fact been filed, and then "subjected to review under Fed. R. Civ. P. 12(b)(6)" by that reviewing court. *Wilder*, 854 F.2d at 613; *Sykes v. James*, 13 F.3d 515, 518-19 (2d Cir. 1993). Though those cases and that principle were cited with approval by the Court of Appeals in this case, App. A at 3a, 6a, the standard was not, in fact, applied by the Second Circuit.

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2. "Citizen suits are an important aspect of the CAA enforcement scheme." *Friends of the Earth v. Carey*, 535 F.2d 165, 172 (2d Cir. 1976); *see also Natural Resources Defense Council, Inc. v. Train*, 166 U.S. App. D.C. 312, 5120 F.2d 692, 699-700 (D.C. Cir. 1974).

As noted, in August 1999, the State of New York made the Redesignation Request to EPA; that triggered the obligation in § 4.4 of the 1992 CO SIP, which took on the force of federal law once approved by EPA. 42 U.S.C. § 7604. It is as if the CAA itself had been amended to include this new responsibility to develop a broader alternative procedure.

This Court has "regularly applied intervening statutes conferring . . . jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." *Landgraf v. USI Film Products, et al.*, 511 U.S. 244, 273 (1994) (citations omitted). In *Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604 (1978), the failure to allege $10,000 in controversy at the commencement of an action was once a fatal defect at the time of filing, mandating dismissal, but became "of no moment" to the reviewing court following passage of a statute, pending the appeal, that eliminated the requirement. Similarly, in *United States v. Alabama*, 362 U.S. 602 (1960), the Justice Department's voting discrimination action brought against Alabama was properly dismissed by the district court, given that the Civil Rights Act of 1957 did not provide for such an action against a state. The dismissal was affirmed by the Court of Appeals for the Fifth Circuit. However, shortly before this Court heard the case, Congress passed the Civil Rights Act of 1960 which expressly allowed for such an action. In allowing the United States to proceed with its law suit, this Court held that "[u]nder familiar principles, the case must be decided on the basis of law now controlling."[3] *Id.*, 362 U.S. at 604.

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3. Notably, this Court did not reach or intimate any view upon the merit of the case or any defenses, but merely allowed the U.S. to continue with its action in Federal Court. *Id.*

Here, the "law now controlling" has changed because of the City's Redesignation Request. Pursuant to the CAA, in conjunction with the 1992 SIP, the City has now incurred a substantially broader obligation and responsibility under federal law. The law has clearly changed while this case was on appeal, and the lower court has stubbornly refused to recognize this change, instead prejudging on the merits based upon out-of-date assumptions. Plaintiffs deserve the opportunity to obtain discovery reflecting the City's action or inaction in carrying out its new responsibilities under the SIP.

When an intervening change occurs in the underlying facts and law, and that change will affect the outcome of a case pending appeal, the Court is bound to consider such change. *State Tax Commission, et al. v. Van Cott*, 306 U.S. 511, 516 (1939) ("in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered") (quoting *Patterson v. Alabama*, 294 U.S. 600, 607). There can be little doubt that "[i]ntervening and conflicting decisions will thus cause the reversal of judgments which were correct when entered." *Vandenmark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 542-43 (1941). For the same reason, the Court of Appeals could not affirm the judgment of the district court "for substantially the same reasons stated in its opinion," App. A at 6a, when the pertinent reasoning was explicitly based on a fact, cited by the district court (*i.e.*, no request yet for redesignation), that ceased to be true while the appeal was *sub judice*.

In sum, the proposed amended complaint should be reinstated, and the case should be remanded to the district court to permit discovery to take place on plaintiffs' allegations.

II.

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE SECOND CIRCUIT'S REQUIREMENTS FOR CITIZEN SUITS. (Question 3)

The court below erred in affirming the district court's finding that the cited provisions of the 1992 New York CO SIP do not contain a "specific strategy" as required in citizen suits. Review of predicted growth indicators, vehicle miles traveled and traffic studies conducted by the State in a variety of areas and intersections, potentially including some not examined in the EIS, are all "specific strategies" and commitments within the meaning of the Clean Air Act citizen suit provision, 42 U.S.C. § 7604(f)(3), and the cases discussing such strategies, *see, e.g.*, *Wilder v. Thomas*, 854 F.2d at 613. The CAA broadly provides that:

> any person may commence a civil action on his own behalf — (1) against any person . . . who is alleged to be in violation of (A) *an emission standard or limitation* under [the CAA]. . . .

42 U.S.C. § 7604(a)(1) (emphasis added). The CAA defines an "emission standard or limitation" as, *inter alia*:

> (3) . . . any condition or requirement under an *applicable implementation plan relating to transportation control measures, air quality maintenance plans*, vehicle inspection and maintenance programs or vapor recovery requirements . . .

> (4) any other standard, limitation, or schedule established . . . under any applicable State implementation plan approved by the Administrator, . . . which is in effect . . . under an applicable implementation plan.

42 U.S.C. § 7604(f)(3). *Wilder*, 854 F.2d at 614; *Coalition*, 967 F.2d at 769.

The State's CO Redesignation Request filed in August 1999 is an "air quality maintenance plan" that, as the district court held would happen, triggered the broader review procedure for potential CO hot spots, which petitioners properly alleged in the Fourth Claim of the proposed amended complaint; the Redesignation Request contains several "specific strategies" to obtain and maintain compliance with the CO standard.

Thus, on remand to the district court for its review of the adequacy of the proposed pleading, the court would have to review this allegation of violation by the City of the "specific strategy" in question, namely, a "broader alternative procedure" as required by the 1992 SIP.[4] Under the facts as they exist now, the Fourth Claim clearly states a claim upon which relief may be granted.

---

4. ¶ 87, the Fourth Claim, alleges in pertinent part that "Defendants violated two specific strategies set forth in . . . the SIP [including] Section 4.4 [which] commits the City to develop a broader alternative procedure to identify *potential* areas at risk of exceedance of the CO standard." (Emphasis in original).

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CRAIG P. MURPHY
Counsel of Record
JAMES J. PERICONI
JOHN D. HOLDEN
WINDELS MARX LANE
& MITTENDORF, LLP
Attorneys for Petitioners
156 West 56th Street
New York, New York 10019
(212) 237-1000

APPENDIX

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED DECEMBER 22, 1999

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

* * *

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 22nd day of December, one thousand nine hundred and ninety-nine.

Present: PIERRE N. LEVAL
GUIDO CALABRESI
ROBERT A. KATZMANN,

Circuit Judges

99-7403

COMMITTEE FOR ENVIRONMENTALLY SOUND DEVELOPMENT, INC., NORTH RIVER COMMUNITY ENVIRONMENTAL REVIEW BOARD, WEST VILLAGE COMMITTEE, COALITION FOR A LIVABLE WEST SIDE, GEORGIO CAVAGLIERI, JOHN L. BUNCH, JR., PHYLLIS GUNTHER, HARRIET WEISSBERGER, and OLIVE FREUD,

Plaintiffs-Appellants,

Appendix A

THE CITY OF NEW YORK, RUDOLPH GIULIANI, as Mayor of The City of New York, THE METROPOLITAN TRANSPORTATION AGENCY, and TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY,

Defendants-Appellees,

* * *

Appeal from the United States District Court for the Southern District of New York (Shirley Wohl Kram, *J.*).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court be and it hereby is **AFFIRMED**.

This matter concerns the proposed redevelopment of the area currently occupied by the New York Coliseum, located on the "superblock" bounded by West 58th Street, West 60th Street, Ninth Avenue and Columbus Circle in New York, New York. Plaintiffs are individuals, and community organizations representing individuals, who claim that they will be adversely impacted by alleged increases in carbon monoxide ("CO") levels caused by, or in the vicinity of, this redevelopment project.

The Clean Air Act (CAA), 42 U.S.C. §§ 7409 *et seq.*, requires the EPA to promulgate national ambient air quality standards (NAAQS) for various pollutants. Each State then determines how to achieve and maintain these standards by devising a State Implementation Plan (SIP). *See* 42 U.S.C.

§ 7410. The citizen suit provision of the CAA creates a private right of action to enforce the Act's provisions. A citizen may bring a suit to enforce: (1) a specific provision of the CAA; or (2) a specific provision of an applicable SIP. *See* 42 U.S.C. § 7604; *see also Wilder v. Thomas*, 854 F.2d 605, 613 (2d Cir. 1988). New York State's current SIP was promulgated in 1992 and replaced a SIP promulgated in 1984. The SIP specifies the use of environmental impact statements (EIS) to evaluate projects that may significantly impact environmental quality. *See Coalition Against Columbus Ctr. v. City of New York*, 967 F.2d 764, 767 (2d Cir. 1992).

Plaintiffs filed a complaint in January 1998 alleging violations of the CAA and New York's Uniform Land Use Review Procedure (ULURP), N.Y. City Charter § 197-c, based upon alleged exceedances of the CO NAAQS ("CO standard") in the vicinity of the site. An amended complaint followed in February 1998. In an unpublished opinion and order, the district court concluded pursuant to Fed. R. Civ. P. 12(b)(6) that plaintiffs had failed to state a federal claim upon which relief could be granted, and therefore declined to exercise supplemental jurisdiction over the state law claims. The court indicated that plaintiffs were free to submit a proposed amended complaint that "should identify, separately, each specific strategy or commitment in New York's SIP alleged to be violated and describe, with some particularity, the respects in which compliance with the provision is deficient. Thereafter, the Court will decide whether leave to amend shall be granted."

In December 1998, plaintiffs filed a proposed amended complaint purporting to identify defendants' violations of

sections 4.0(2) and 4.4 of the 1992 SIP. Section 4.0(2) of the 1992 SIP states in relevant part that:

> The [1984] SIP committed the State and City to:
>
> . . .
>
> 2. Follow a specified procedure for the ongoing identification and mitigation of hot spots. This procedure entailed a commitment by the City to review Environmental Impact Statements (EIS) and assure that any site at which an EIS identifies a violation or exacerbation of the carbon monoxide standard is brought into attainment of the standard.

Section 4.4 of the 1992 SIP declares in relevant part that:

> The 1984 SIP states ". . . if an EIS for a project identifies a violation or exacerbation of the carbon monoxide standard, then the City commits to assure that mitigating measures will be implemented . . . ."
>
> The City of New York will continue to follow the procedure for identifying potential exceedances resulting from new projects and/or disclosed in the environmental review process. The City will continue to assure that project sponsors or the City

> will mitigate potential exceedances caused by a project . . . .
>
> The State and City commit to develop a broader alternative procedure to identify potential areas at risk of exceedance of the CO standard, taking into account a wider database, consistent with all relevant methodologies, including: modeling, data collection and growth projection. This new procedure will become part of the CO Maintenance Plan which must be submitted at the time that the State requests redesignation of the nonattainment area as an area which has attained the NAAQS for CO.

In an unpublished opinion and order dated March 9, 1999, the district court denied plaintiffs leave to amend their complaint, concluding that the proposed amendments did not state a claim upon which relief could be granted. With regard to the alleged violations § 4.0(2), the court held that: (1) § 4.0(2) does not state a specific strategy or commitment upon which plaintiffs could base a suit because it is merely a description of the commitments outlined in the 1984 SIP; and (2) in any event, plaintiffs' underlying § 4.0(2) claim was based upon alleged exceedances not identified in the EIS.[2] As for § 4.4, the court held that: (1) plaintiffs' claim that the City violated this section by failing to mitigate "potential" exceedances did not state a cause of action

---

2. The particular EIS for the redevelopment project at issue here is known as the "Final Supplemental Environmental Impact Statement."

because the EIS had not identified any such exceedances;[3] and (2) the City's obligation under the Section to develop "a broader alternative procedure to identify potential areas at risk of exceedance of the CO standard" is triggered by a request from New York State for redesignation of New York City as a "nonattainment area," an event which has not yet occurred. The court accordingly denied plaintiffs' motion to amend their complaint and dismissed the case.

When a district court has "found [a] proposed amended complaint legally insufficient and denied plaintiffs any opportunity to further amend their pleading . . . . [the] decision [is reviewed] as if the amended complaint had been filed and then subject[ed] to review under Fed. R. Civ. P. 12(b)(6)." *Wilder*, 854 F.2d at 613. A district court's dismissal of a complaint pursuant to Rule 12(b)(6) is reviewed *de novo*. *See, e.g.*, *Sykes v. James*, 13 F.3d 515, 518-19 (2d Cir. 1993).

On appeal, plaintiffs repeat many of the arguments made before the district court. With regard to these arguments, we agree with the judgment of the district court for substantially the same reasons stated in its opinion and summarized above.[4] The district court's opinion does not address

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3. To the extent plaintiffs allege that the preparation of the EIS in this case was flawed or inadequate, such a claim standing alone does not state a federal cause of action. *Cf. South Bronx Coalition for Clean Air, Inc. v. Conroy*, 20 F. Supp.2d 565, 570-71 (S.D.N.Y. 1998).

4. We note that, with respect to the holding that a portion of plaintiffs' claim under § 4.4 of the SIP is premature, we express no view on whether that claim may be brought at some later date.

plaintiffs' argument that § 4.4's language stating that "[t]he City of New York will continue to follow the procedure for identifying potential exceedances resulting from new projects and/or disclosed in the environmental review process" requires defendants to conduct an environmental review that goes beyond the EIS. We now reject this argument. When this isolated quote is read in context, it becomes evident that it merely refers back to § 3.6(A) of the 1984 SIP and does not mandate an environmental review process independent of an EIS in this case:

> *The 1984 SIP states* ". . . if an EIS for a project identifies a violation or exacerbation of the carbon monoxide standard, then the City commits to assure that mitigating measures will be implemented . . . ."
>
> The City of New York will *continue* to follow *the* procedure for identifying potential exceedances resulting from new projects and/or disclosed in the environmental review process. The City will *continue* to assure that project sponsors or the City will mitigate potential exceedances caused by a project. Exceedances *identified in the environmental review process* which are not caused by the project will be subject to appropriate control measures.

(emphasis added).

Nor does the district court's opinion address plaintiffs' argument that under § 4.4 they need only allege a mere

exacerbation of CO levels, as opposed to an *exceedance* of the CO standard, in order to state a cause of action. It seems clear to us that under this provision the City's obligation to mitigate CO levels is triggered only where an exceedance of the CO standard is created or an already existing exceedance is exacerbated, not where CO levels increase but stay below the standard. To hold otherwise would establish an entirely standardless obligation, requiring mitigation for *any* increase in CO levels. Plaintiffs' argument on this point is without merit.

Accordingly, for the foregoing reasons, the judgment of the district court is affirmed.

FOR THE COURT:

KAREN GREVE MILTON,
Acting Clerk

By: s/ Ralph A. Anderson
RALPH A. ANDERSON,
Deputy Clerk
ACTING OPERATIONS
MANAGER

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED MARCH 9, 1999

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

98 Civ. 272 (SWK)

COMMITTEE FOR ENVIRONMENTALLY SOUND DEVELOPMENT, INC., NORTH RIVER COMMUNITY ENVIRONMENTAL REVIEW BOARD, WEST VILLAGE COMMITTEE, COALITION FOR A LIVABLE WEST SIDE, GEORGIO CAVAGLIERI, JOHN L. BUNCH, JR., PHYLLIS GUNTHER, HARRIET WEISSBERGER, OLIVE FREUD,

Plaintiffs,

-against-

THE CITY OF NEW YORK, RUDOLPH GIUILIANI AS MAYOR OF THE CITY OF NEW YORK, THE METROPOLITAN TRANSPORTATION AUTHORITY, and TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY,

Defendants.

ORDER

SHIRLEY WOHL KRAM, U.S.D.J.

In this action alleging violations of the Clean Air Act ("CAA"), 42 U.S.C. §§ 7401 *et seq.*, and the New York City Uniform Land Use Review Procedure ("ULURP"), N.Y. City

Charter § 197-c, in connection with the redevelopment of the area currently occupied by the New York City Coliseum (the "Coliseum site")[1], plaintiffs move, pursuant to Federal Rule of Civil Procedure 15(a), to amend their complaint. For the reasons set forth below, the motion is denied and the action is dismissed.

On December 1, 1998, having determined that plaintiffs' complaint failed to state a claim on which relief may be granted, plaintiffs were granted an opportunity to prepare a proposed amended complaint, pursuant to Federal Rule of Civil Procedure 15(a) .[2] On December 23, 1998, plaintiffs filed a proposed amended complaint that purports to identify violations of specific strategies and commitments in New York's State Implementation Plan, New York State Air Quality Implementation Plan for Control of Carbon Monoxide and Hydrocarbons in New York City Metropolitan Area (Jan. 1984) ("1984 SIP"); New York State Implementation Plan, Carbon Monoxide Attainment Demonstration New York Metropolitan Area (Nov. 1992) ("1992 SIP").[3]

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1. The subject of this action is the former New York City Coliseum, an office building and a parking garage located on the "superblock" bounded by West 58th Street, West 60th Street, Ninth Avenue and Columbus Circle in New York, New York.

2. The background of this case is set forth more fully in the Court's December 1, 1998 Memorandum Opinion and Order ("December 1998 Order"), familiarity with which is presumed. Only those facts related to the disposition of the instant motion are discussed below.

3. Pursuant to the CAA, each state determines how to achieve and maintain national ambient air quality standards ("NAAQS") by devising a State Implementation Plan.

Appendix B

Federal Rule of Civil Procedure 15(a) provides, in part, that once a responsive pleading has been served, "a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). The decision to grant or deny leave to amend lies within the Court's discretion. *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227 (1962). In this case, the Court is guided by the standards of Federal Rule of Civil Procedure 12(b) in deciding whether leave to amend shall be granted.

In evaluating a complaint under Rule 12(b), the Court must accept the allegations in the complaint as true and construe them in the light most favorable to the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686 (1974); *Easton v. Sundram*, 947 F.2d 1011, 1014-15 (2d Cir. 1991), *cert. denied*, 504 U.S. 911 (1992). A complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99 (1957). In its December 1998 Order, to avoid dismissal of the complaint, the Court directed plaintiffs to identify, separately, in their proposed amended complaint "each specific strategy or commitment in New York's SIP alleged to be violated and describe, with some particularity, the respects in which compliance with the provision is deficient." December 1998 Order at 11.

Plaintiffs' proposed amended complaint rests on alleged violations of two sections of the 1992 SIP. Specifically, plaintiffs allege that the City of New York has violated Sections 4.0(2) and 4.4. Section 4.0(2) of the 1992 SIP states:

Appendix B

The [1984] SIP committed the State and City to:

> . . .
>
> 2. Follow a specified procedure for the ongoing identification and mitigation of hot spots. This procedure entailed a commitment by the City to review Environmental Impact Statements (EIS) and assure that any site at which an EIS identifies a violation or exacerbation of the carbon monoxide standard is brought into attainment of the standard.

1992 SIP, § 4.0(2). Section 4.0(2) is simply part of the 1992 SIP's description of the committments outlined in the 1984 SIP. Section 4.0(2) does not contain its own specific strategy or commitment on which plaintiffs' suit may rest. Furthermore, underlying plaintiffs' Section 4.0(2) claims are essentially the same arguments about "hot spots" found insufficient in plaintiffs' original complaint. *See* December 1998 Order, at 15-16.

Section 4.4 of the 1992 SIP states, in relevant part:

> The City of New York will continue to follow the procedure for identifying potential exceedances resulting from new projects and/or disclosed in the environmental review process. The City will continue to assure that project sponsors or the City will mitigate potential

> exceedances caused by a project . . . . The State and City commit to develop a broader alternative procedure to identify potential areas at risk of exceedance of the CO standard, taking into account a wider database, consistent with all relevant methodologies, including: modeling, data collection and growth projection. This new procedure will become part of the CO Maintenance Plan which must be submitted at the time that the State requests redesignation of the nonattainment area as an area which has attained the NAAQS for CO.

1992 SIP, § 4.4. Plaintiffs argue that defendants have violated Section 4.4 by failing to mitigate potential exceedances. Specifically, plaintiffs argue that the City's has failed to implement an enhanced motor vehicle inspection and maintenance program and failed to develop an alternative procedure to identify potential areas at risk of exceeding the NAAQS standard. However, an explained extensively in the December 1998 Order, the environmental review process has not identified any exceedances that will be caused by redevelopment of the Coliseum site. *See* December 1998 Order, at 12-13.[4] Accordingly, the redevelopment of the Coliseum site as outlined in the EIS does not trigger a mitigation obligation for the City. Furthermore, any alleged deficiencies in the environmental review process are not

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4. Plaintiffs' allegation that redevelopment of the Coliseum site will result in a level of carbon monoxide close to the NAAQS in the vicinity of the Coliseum site is also insufficient to state a claim under this section. *See* Proposed Amended Complaint, ¶ 65.

the proper subject of a citizen suit under the CAA.[5] *See* December 1998 Order at 14.

Nevertheless, plaintiffs argue that the City is obligated to develop a broader procedure for the identification of potential exceedances caused by a project than is currently used in the EIS process. However, the City's obligation to develop "a broader alternative procedure to identify potential areas at risk of exceedance of the CO standard" is a future one, which is triggered by a request from New York State for redesignation of New York City as a nonattainment area. 1992 SIP, § 4.4. Plaintiffs have not alleged that such a triggering event has occurred.

For the reasons set forth above and in the Court's December 1998 Order, plaintiffs' proposed amended complaint fails to state a claim on which relief may be granted. Accordingly, plaintiffs' motion to amend its complaint is denied and this action is dismissed.

SO ORDERED.

s/ Shirley Wohl Kram
SHIRLEY WOHL KRAM
UNITED STATES DISTRICT JUDGE

DATED: New York, New York
March 9, 1999

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5. Plaintiffs' assertion that the 1992 SIP enables citizen suits where a project sponsor has intentionally omitted a hot spot from their environmental review is unsupported and without merit.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED FEBRUARY 11, 2000

U.S. COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

KAREN GREVE MILTON
ACTING CLERK

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 11th day of February, two-thousand.

Present:

Hon. Pierre N. Leval

Hon. Guido Calabresi,

Hon. Robert A. Katzman,

CIRCUIT JUDGES.

Docket No. 99-7403

Committee for Environmentally
Sound Development, et al.,

Plaintiffs-Appellants,

v.

Appendix C

The City of New York, et al.

Defendants-Appellees,

Order

A petition for panel rehearing having been filed herein by The Committee for Environmentally Sound Development, et al.,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is **DENIED**.

FOR THE COURT
KAREN GREVE MILTON,
Acting Clerk

By: s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney

APPENDIX D — STATUTORY PROVISIONS AND RULES INVOLVED

The pertinent part of the federal Clean Air Act, 42 U.S.C. §§ 7401, *et seq.*, is the citizen suit provision, 42 U.S.C. § 7604, which states in relevant part:

> any person may commence a civil action on his own behalf — (1) against any person . . . who is alleged to be in violation of (A) an emission standard or limitation under [the CAA]. . . .

42 U.S.C. § 7604(a)(1).

The CAA defines an "emission standard or limitation" as, *inter alia*:

> (3) . . . any condition or requirement under an applicable implementation plan relating to transportation control measures, air quality maintenance plans, vehicle inspection and maintenance programs or vapor recovery requirements . . . or
>
> (4) any other standard, limitation, or schedule established . . . under any applicable State implementation plan approved by the Administrator, ...

which is in effect . . . under an applicable implementation plan.

42 U.S.C. § 7604(f)(3)-(4).

Appendix D

Federal Rule of Civil Procedure 12(b)(6) ("Defenses and Objections") provides in pertinent part:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted, . . .

Fed. R. Civ. P. 12(b)(6).

Federal Rule of Civil Procedure 15(a) ("Amended and Supplemental Pleadings") provides in pertinent part:

> A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, . . . within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

Fed. R. Civ. P. 15(a).

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Section 4.4 of the 1992 New York State Carbon Monoxide State Implementation Plan declares in relevant part that:

> The State and City commit to develop a broader alternative procedure to identify potential areas at risk of exceedance of the CO standard, taking into account a wider database, consistent with all relevant methodologies, including: modeling, data collection and growth projection. This new procedure will become part of the CO Maintenance Plan which must be submitted at the time that the State requests redesignation of the nonattainment area as an area which has attained the NAAQS for CO.

1992 New York CO SIP.

(2)

NO. 99-1814

MOTION FILED

JUN – 8 2000

IN THE
SUPREME COURT OF THE UNITED STATES

COMMITTEE FOR ENVIRONMENTALLY SOUND DEVELOPMENT, INC., NORTH RIVER COMMUNITY ENVIRONMENTAL REVIEW BOARD, WEST VILLAGE COMMITTEE, COALITION FOR A LIVABLE WEST SIDE, GEORGIO CAVAGLIERI, JOHN L. BUNCH, JR., PHYLLIS GUNTHER, HARRIET WEISSBERGER and OLIVE FREUD,

Petitioners,

-against-

THE CITY OF NEW YORK, RUDOLPH GIULIANI, as Mayor of The City of New York, THE METROPOLITAN TRANSPORTATION AGENCY and TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY,

Respondents.

CITY RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MICHAEL D. HESS,
Corporation Counsel of the
City of New York,
Attorney for City Respondents,
100 Church Street,
New York, New York 10007.
(212) 788-1010, 1041

LEONARD J. KOERNER*
FRANCIS F. CAPUTO,
GEORGE GUTWIRTH,
of Counsel

June 9, 2000

*Counsel of Record

2800

COUNTER STATEMENT OF THE QUESTION PRESENTED

Did the United States Court of Appeals for the Second Circuit correctly affirm the denial by the District Court for the Southern District of New York of plaintiffs' application to replead their purported claim under the Clean Air Act (CAA), 42 U.S.C. §7401, et. seq., based on which plaintiffs sought to enjoin the sale and redevelopment of the Coliseum site at Columbus Circle in Manhattan? The ruling on whether to permit repleading involved construction of the applicable New York State Implementation Plan (SIP) for compliance with Clean Air Act (CAA) carbon monoxide (CO) control standards.

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CITY RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

COUNTER STATEMENT OF THE CASE

In this action, petitioners sought a declaratory judgment that the City failed to comply with the Clean Air Act, the New York State Environmental Quality Review Act (SEQRA), Environmental Conservation Law (ECL) § 8-0101, et. seq., and the New York City Charter, § 197-c, Uniform Land Use Review Procedure (ULURP),[1] with

[1] In the First Opinion and Order of the District Court, dated December 1, 1998 (not included in Petitioners' Appendix before this Court), pendent jurisdiction of the state law claims was denied, based on the dismissal of the federal claims. The state law claims were litigated to final determination adverse to plaintiffs before the New York State courts. In a detailed opinion, Supreme Court, New York County, by Decision and Judgment, dated August 2, 1999, dismissed plaintiffs' SEQRA claim, which was largely that the Final Environmental Impact Statement (FEIS) for the proposed Coliseum redevelopment was inadequate because it did not analyze the effect of the proposed redevelopment on CO levels at Madison Avenue and 59th Street, which had been identified as the site of a potential CO exceedance in the late 1980s. The defendants' position was that updated modeling techniques warranted analysis of other locations to determine the effect of the proposed project on CO levels, and, in any event,

(continued...)

(...continued)
there had been no exceedance of the National Ambient Air Quality Standard (NAAQS) for CO anywhere in Manhattan since 1991. Supreme Court, New York County, also rejected petitioner's claim that the sale of the Coliseum site was subject to ULURP, which applies to property of the City of New York, a claim made despite a prior ruling by the New York Court of Appeals in Jo & Wo Realty Corp. v. City of New York, 76 N.Y.2d 962 (1990), that the site was the property of the Triborough Bridge and Tunnel Authority (TBTA), which is not an agency of the City of New York, and thus a contract for the sale thereof was not subject to City bidding procedures.

The Appellate Division, First Department, by Decision and Order, dated January 11, 2000, Committee for Environmentally Sound Development, Inc., et. al. v. City of New York, 700 NYS2d 694, unanimously affirmed the Judgment of Supreme Court, New York County, stating:

> The court properly determined that the sale and dispositon of the Coliseum site was not subject to the Uniform Land Use Review Procedure (*See*, New York City Charter § 197-c; *Jo & Wo Realty Corp. v. City of New York*, 76 N.Y.2d 962, *see also, Matter of Waybro Corp. v. Bd. of Estimate of the City of New York*, 67 N.Y.2d 349, and that respondents complied with State Environmental Quality

(continued...)

respect to the proposed sale and redevelopment of the Coliseum site at Columbus Circle in Manhattan, which is owned by the Triborough Bridge and Tunnel Authority (TBTA). Petitioners sought a consequent injunction against that sale and redevelopment.

The CAA, 42 U.S.C. §7604, provides that "any person may commence a civil action on his own behalf-"

> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to have violated (if there is evidence that the

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(...continued)

> Review Act by identifying the relevant areas of environmental concern and by then taking the required "hard look" at them (*see, Matter of Kahn v. Pasnik*, 90 N.Y.2d 569, *Matter of Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 417, 503 N.Y.S.2d 298, 494 N.E.2d 429).

By Order dated April 6, 2000 (2000 NY Lexis 552), the New York Court of Appeals denied leave to appeal the Decision and Order of the Appellate Division, First Department.

> alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this chapter.

Under 42 U.S.C. §7604(f) an "emission standard or limitation" includes "(1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard."

Under the CAA, the Environmental Protection Agency (EPA) promulgates the national ambient air quality standards (NAAQS), 42 U.S.C. § 7409. Each state must develop, subject to EPA approval, a State Implementation Plan (SIP) to implement, maintain and enforce the NAAQS for each regulated pollutant. 42 U.S.C. § 7410. See Coalition Against Columbus Center v. City of New York, 967 F.2d 764, 766-767 (2d Cir. 1992); Wilder v. Thomas, 854 F.2d 605, 608-610 (2d Cir. 1988) cert. den. 489 U.S. 1053 (1989). Once a SIP is adopted by the EPA it becomes federal law. United States v. General Motors Corp., 876 F.2d 1060, 1063 (1st Cir. 1989) affd 496 U.S. 530 (1989).

The applicable New York State SIP relies on environmental impact statements to determine if a project has the potential to cause an exceedance of the NAAQS for CO. An exceedance occurs when in a calendar year there is more than one maximum concentration exceeding nine parts per million as a combined average over an eight hour period (See 40 CFR § 50.8(a)(1); NY State 1992 SIP, p. 10; Coalition Against Columbus Center v. City of New York supra, 967 F.2d at 768 (2d Cir. 1992). Specifically, the applicable 1992 SIP states, under "Savings Provisions", § 4.0, that the prior SIP committed the State and City to:

"Follow a specified procedure for the ongoing identification and mitigation of hot spots. This procedure entailed a commitment by the City to review Environmental Impact Statements (EIS) and assure that any site at which an EIS identifies a violation or exacerbation of the carbon monoxide standard is brought into attainment of the standard." Section 4.2.2 of the 1992 SIP states: "The 1984 SIP commits to a procedure which depends on EISs to identify additional sites with a potential for exceedance of the CO standard. The exceedance identification process committed to in the SIP has been followed." Section 4.4, "Revised Procedures for Identifying New CO Exceedances," states:

> The 1984 SIP [3.6a] states "To further ensure that the carbon monoxide standard is attained in New York City, if any EIS for a project identifies a violation or exacerbation of the carbon monoxide standard, then the City commits to assure that mitigating measures will be implemented by the project sponsor or City, so as to provide for attainment of the standard by December 31, 1987 and maintenance of it thereafter."
>
> The provision for a specific date for attainment in this procedure is revised in this present SIP submittal from December 31, 1987 to December 31, 1995 to reflect the requirements of The Act.
>
> The City of New York will continue to follow the procedure for identifying potential exceedances resulting from new projects and/or disclosed in the

> environmental review process. The City will continue to assure that project sponsors or the City will mitigate potential exceedances caused by a project. Exceedances identified in the environmental review process which are not caused by the project will be subject to appropriate control measures.

First Decision and Order of the District Court

In an Opinion and Order dated December 1, 1998, (not included in Petitioners' Appendix before this Court), the District Court dismissed the complaint. Citing Wilder v. Thomas, supra, 854 F.2d at 613, the Court noted that pursuant to 42 U.S.C. § 7604(a) (1) and (3), the plaintiffs could invoke the court's jurisdiction only to enforce specific provisions of the CAA or specific provisions of an applicable SIP, and they had to identify with some particularity the respects in which compliance with the provision is deficient, citing Coalition Against Columbus Center v. City of New York, supra, 967 F.2d at 769. There was no private right of action to enforce a NAAQS, which is not included within the statutory definition (42 USC 7604(f)) of an "emission standard or limitation". In prior litigation concerning this site, the Second Circuit Court ruled that the mitigating measures for the 59th Street "hot spot"[2] identified in an EIS done in the early 1980s were sufficient. Coalition Against Columbus Center v.

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[2] A "hot spot" is a location with the potential to exceed the CO standard. Coalition against Columbus Center v. City of New York, supra, 967 F.2d at 768.

City of New York, supra, 967 F.2d at 771.[3] The current FEIS did not identify any violation or exacerbation of the CO standard. "Accordingly, no mitigation obligation attaches to the 1998 project and the City cannot have an obligation to mitigate something that, for these purposes, does not exist." The SIP designates the SEQRA EIS process as the mechanism for reviewing the environmental impacts of projects like the one at issue. SEQRA establishes a set of procedures designed to assure that an action's potentially significant environmental consequences are disclosed from the inception of the planning processes; and the extent to which the procedures have been followed in any particular case is subject to state judicial review, citing Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 400, 416, 417 (1986); Wilder v. Thomas, supra, 854 F.2d at 619. A claim that an EIS was inadequate did not state a federal cause of action under the CAA. The claim that the 59th Street "hot spot" should have been analyzed under the current FEIS was simply a challenge to the preparation of the EIS, which was a state law claim.

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[3] The District Court noted that the Coliseum project was not a "stationary source" under 42 U.S.C § 7602 (j), as it would not directly emit the regulated pollutants . Vehicular traffic associated with the project could not render it a "stationary source," because under 42 U.S. C. § 7602 (z), emissions resulting directly from an internal combustion engine for transportation vehicles are excluded from the definition of "stationary source", citing Village of Oconomoc Lake v. Dayton Hudson Corp., 24 F.3d 962, 963 (7th Cir. 1994) cert. den. 513 U.S. 930 (1994) ("vehicular emissions are not attributed to the buildings served as points of origin or destination").

District Court's Order Denying the Motion to Amend the Complaint

By Order dated March 9, 1999 (Appendix B), the District Court denied the motion to amend the complaint. The District Court found to be legally insufficient the allegations that the City violated SIP § § 4.0(2) and 4.4. The District Court stated that § 4.0(2) simply continued the commitments outlined in the 1984 SIP and does not contain its own specific strategy or commitment on which the plaintiffs may sue. Furthermore, the allegations concerning omissions in the FEIS were essentially the same allegations about allegedly omitted hot spots, which allegations were held to be insufficient in the original complaint. With respect to § 4.4 of the SIP, as explained in the earlier decision, no duty to mitigate an exceedance arose since the environmental review process had not identified any exceedance that would be caused by the development of the Coliseum site. Any inadequacies in the environmental review process were not the proper subject of a citizen suit under the CAA.

The District Court also rejected plaintiffs' contentions that a provision of § 4.4 of the 1992 SIP required additional analysis of the proposed project's effect on CO levels. That provision states:

> The State and City commit to develop a broader alternative procedure to identify potential areas at risk of exceedance of the CO standard, taking into account a wider database, consistent with all relevant methodologies, including: modeling, data

collection, and growth projection. This new procedure will become part of the CO Maintenance Plan which must be submitted at the time that the State requests redesignation of the nonattainment area as an area which has attained the NAAQS for CO.

The District Court ruled that this provision was not in effect and would become effective in the future only if New York State requested redesignation of New York City from a nonattainment area to one which had achieved attainment (Appendix B, p. 14a).

As the proposed amended complaint failed to state a claim on which relief may be granted, the motion to amend the complaint was denied and the action dismissed, as effected by a Judgment, filed March 12, 1999.

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

In a Summary Order, dated and filed December 22, 1999 (Appendix A), the United States Court of Appeals for the Second Circuit affirmed the judgment of the District Court.

Reviewing the proposed amended complaint as if it had been filed and then subjected to review, Wilder v. Thomas, supra, 854 F.2d 613, and reviewing the dismissal of the complaint de novo, Sykes v. James, 13 F.3d 515, 518-519 (2d Cir. 1993), the complaint failed to state a claim upon which relief may be granted (Appendix A, p.

6a). In addition to adopting the reasons of the District Court as to why the proposed amended complaint was deficient, the Circuit also rejected plaintiffs' argument that § 4.4 of the SIP required a review for potential CO exceedances from a project beyond that in the EIS for the project, and plaintiffs' contention that the potential for an increase in CO levels rather than for a potential exceedance of the CO NAAQS level, required mitigation measures. The Circuit stated, Appendix A (8a):

> It seems clear to us that under this provision the City's obligation to mitigate CO levels is triggered only where an exceedance of the CO standard is created or an already existing exceedance is exacerbated, not where CO levels increase but stay below the standard. To hold otherwise would establish an entirely standardless obligation, requiring mitigation for *any* increase in CO levels. Plaintiffs' argument on this point is without merit.

In August 1999, after briefing of the case, but before oral argument before the Second Circuit, the State of New York Department of Environmental Conservation (DEC) submitted to EPA, pursuant to 42 U.S.C. § 7407 (3) (D), a SIP plan revision proposing to redesignate the New York Metropolitan Area as an area which is in attainment of the CO NAAQS, and, as required by 42 U.S.C. § 7505 (a) in connection with a redesignation request, a Maintenance Plan to maintain the level of compliance upon which the redesignation request was based. These materials were provided to the Second Circuit prior to oral argument. In footnote 4 of the Circuit's opinion (Appendix A, p. 6a), that Court stated that with respect to the portion

of plaintiffs' claim under 4.4 of the SIP which is premature, the Court expressed no view as to whether that claim may be brought at some later date.

REASONS FOR DENYING THE WRIT

The Second Circuit correctly determined that the proposed amended complaint failed to state a CAA claim upon which relief may be granted. As that Court stated in Wilder v. Thomas, supra, 854 F.2d at 613: "In order to avoid either overburdening the courts or unduly interfering with implementation of the act, however, congress carefully circumscribed the scope of the provision by authorizing citizens to bring suit only for violations of specific provisions of the act or specific provisions of an applicable implementation plan. . . . By the specificity requirements congress sought to establish 'an objective evidentiary standard [that] would have to be met by the citizen who brings an action under [§ 7604]' and therefore eliminate the need for 'reanalysis of technological or other considerations at the enforcement stage'. See Citizens Ass'n of Georgetown the Committee of 100 on the Fed City v. Washington, 535 F.2d 1318, 1322 (D.C. Cir. 1976)." As stated in Coalition Against Columbus Center v. City of New York, supra, 967 F.2d at 769: "The citizen suit provision of the Clear Air Act creates a limited private right of action to enforce the Act's provisions. . . To state a claim under the citizen suit provision a plaintiff must allege a violation of 'a specific strategy or commitment in the SIP and describe, with some particularity, the respects in which compliance with the provision is deficient.' Council of Commuter Organizations v. [MTA], 683 F.2d [663] at 670 [(2d Cir. 1982)]; see Wilder II, 854 F.2d at 610; Action for Rational Transit v. West Side Highway Project, 699 F.2d

614, 616 (2d Cir 1983)." Accord: Conservation Law Foundation, Inc. v. Busey, 79 F.3d 1250, 1258 (1st Cir. 1996).

A violation of the National Ambient Air Quality Standard (NAAQS) is not addressable by a citizen suit, because a NAAQS standard itself is not an emission standard or limitation under 42 U.S.C.§ 7604(a)(1) and (f)(3). Coalition Against Columbus Center v. City of New York, supra, 967 F.2d at 769; Conservation Law Foundation v. Busey, supra, 79 F.3d at 1258; Wilder v. Thomas, 854 F.2d at 613-616; League to Save Lake Tahoe, Inc. v. Trounday, 598 F.2d 1164, 1173 (9th Cir. 1979) cert. den. 444 U.S. 943 (1979) (a claim that a project was erroneously approved although it could cause a violation of ambient air quality standards did not constitute a SIP violation addressable by citizen suit under the CAA. Such a claim blurred the distinction between the NAAQS and an emission standard or limitation and would improperly sanction federal jurisdiction based solely on a prospective violation of the NAAQS, for which the CAA provided no basis. Thus in Wilder v. Thomas, supra, 854 F.2d at 614, the court held insufficient a CAA citizen suit based on an alleged failure to eliminate CO hot spots. Such a claim eliminated the distinction between the NAAQS, which could not be addressed by a citizen suit, and measures that are designed to attain the NAAQS, which, if contained in a specific provision of a SIP, are the permissible subject of a citizen suit. This interpretation adhered to the statutory language of the CAA citizen suit provision while effectuating both the congressional purpose of fostering enforcement and the equally important purpose of

providing specific objective standards for citizen suits. Wilder v. Thomas, supra, 854 F.2d at 616.

While in Wilder and Coalition Against Columbus Center, supra, 967 F.2d 764, the EIS for the projects at issue revealed "a violation or exacerbation of the CO standard", activating the City's commitment to assure that mitigation measures would be implemented by the project sponsor or the City, in the instant case the project EIS did not indicate any exceedance or potential exceedance of the CO standard. The EIS indicated a significant air quality impact only in that under one proposal for developing the site, the 8-hour CO concentration would increase by 1 ppm. at two receptor locations, which was a de minimis increase under City standards but would exceed New York State de minimis criteria. This impact would be mitigated by traffic control measures. Since the EIS did not indicate any "violation or exacerbation of a CO standard" (§ 4.4, 1992 SIP, incorporating 3.6(A), 1984 SIP) or any potential exceedance resulting from the new project, by the express terms of the SIP, no mitigation was necessary. The SIP did not activate any requirement based on the EIS for this project. Petitioners' complaint concerning air quality was precipitated solely by the proposal to redevelop the Coliseum site. Under the SIP, the mechanism for evaluating the potential for CO exceedance caused by an indirect source project is the EIS. As stated by the court in Atlantic Terminal Urban Renewal Area Coalition v. New York City Department of Environmental Protection, 740 F.Supp. 989, 990, (S.D.N.Y. 1990), the SIP provisions committing the City to mitigation measures if an EIS identifies a violation or exacerbation of the CO standard "has a simple conditional construction: if X occurs, then the

City commits to do Y." The condition that triggers the City's commitments is the identification of a violation or exacerbation of the NAAQS. Since the EIS in this case did not indicate a violation or exacerbation of the CO standard or an exceedance or potential exceedance thereof, X has not occurred, and there is no obligation to do Y (adopt mitigation measures).

The instant ruling of the Circuit was consistent with the prior holding of that Court in Wilder. In essence, petitioners challenged the sufficiency of an EIS and attributed to the City a nonexistent obligation under the SIP to make an "independent review" of the air quality impacts of a project. In Wilder v. Thomas, supra, both the District Court and the Second Circuit rejected the claim that the City or State environmental agencies had a duty to conduct a "SIP review" of the project at issue. There was no such requirement in the SIP. Id. 659 F.Supp. at 1506. What the SIP required was mitigation measures if an EIS indicated a violation or exacerbation of the CO standard. The Second Circuit stated: "Finally, plaintiffs' sixth claim, which alleges in essence that the DEC and DEP should have reviewed the project EIS prior to approval by the UDC, must also fail. First, the SIP does not contain a requirement that DEC or DEP make an 'SIP' review of a project before the lead agency, in this case UDC, approves it". Id. 854 F.2d at 621.

The SIP relies on the EIS process to disclose violations, exacerbations and potential exceedances. Once approved by EPA, the SIP constitutes Federal law, and the courts cannot rewrite it to impose additional requirements, see Delaware Valley Citizens Council for Clean Air v.

Davis, 932 F.2d 256, 266 (3rd Cir. 1991), or enforce obligations not contained therein, Plan for Arcadia, Inc. v. Anita Associates, 501 F.2d 390, 392 (9th Cir. 1974) cert. den. 419 U.S. 1034 (1974), which would result from adoption of plaintiffs' erroneous interpretation of the SIP as requiring independent government review of an EIS with respect to findings therein as to air quality impacts.

Plaintiffs also failed to provide any reason to the Second Circuit as to why New York State's filing with the EPA of a request to redesignate the New York Metropolitan Area as an attainment area, with a maintenance plan including a procedure to identify New York City areas at risk of exceedance of the CO standard, provided a basis for a claim under the CAA. The filing of an attainment demonstration, including procedure to identify New York City areas at risk of exceedance of the CO standard, constituted compliance with that provision in § 4.4 of the SIP requiring that such a procedure be part of the CO Maintenance Plan submitted as part of the attainment demonstration and redesignation request. The EPA has not approved the attainment demonstration and redesignated New York City as an area where compliance with the CO standard has been attained, nor has the EPA approved the State Maintenance Plan. The CAA specifically states that a request for redesignation must be approved by the EPA to be effective, 42 U.S.C. 7407 ((F) (4), and can be approved only if the request meets the standards set forth in 42 U.S.C. § 7407(E). The mere submission thereof does not affect the enforceability of the applicable implementation plan. 42 U.S.C. § 7407 (3) (D). The Maintenance Plan submitted with a redesignation request is not in effect until the redesignation and such a

SIP revision are approved by the EPA. 42 U.S.C § 7505a (c). It is well established that until EPA approves the Maintenance Plan it is not in effect. United States v. General Motors Corp., 876 F.2d 1076 (1st Cir. 1989), affd 496 U.S. 530 (1990); State of Ohio v. Ruckelshaus, 776 F.2d 1333 (6th Cir. 1985) cert. den. 476 U.S. 1169 (1986). The CAA and case law make clear that the adequacy of the redesignation request and maintenance plan are matters to be determined in the first instance by the EPA and not by the courts. Accordingly, the Second Circuit correctly held that any claim based on the proposed maintenance plan, and the procedure therein for identifying City areas at risk of an exceedance of the CO standard, is premature.

A facial review of the documents provided to the Second Circuit, (no part of which being provided as an Appendix to this Court) also shows that these provide no basis whatsoever for any claim that the proposed project should be enjoined as in violation of the CAA. Petitioners provided no explanation to the Second Circuit, and offer none to this Court, as to how this proposed Maintenance Plan provides any basis for a claim that the project is not in compliance with the CAA, notwithstanding the requirement that a legally sufficient claim under the limited citizen private right of action provisions of the CAA must allege a violation of a specific strategy or commitment in a SIP and describe with some particularity the respects in which compliance with the provision is deficient. Coalition Against Columbus Center v. City of New York, supra, 967 F.2d at 969; Council of Commuter Organizations v. MTA, supra, 683 F.2d at 670; Wilder v. Thomas, supra, 854 F.2d at 610; Action for Rational Transit v. West Side Highway

Project, supra, 699 F.2d at 616; Conservation Law Foundation v. Busey, supra, 79 F.3d at 1258.

The document in question recites air quality monitoring results at locations in New York City where in the past CO concentrations have been highest, indicates no current exceedance of the CO standard, and includes projections based on modeling, predicting that despite a projected increase in vehicular travel, improvements in gasoline and replacement of older polluting vehicles with newer cleaner ones will result in maintenance of the CO standard. The plan provides for continued monitoring and modeling so that contingency measures can be activated in the event measurements or modeling indicate or predict currently unexpected increases in CO emissions. The use of EIS documents to identify potential for CO exceedances arising from specific projects is continued (p. 20, Maintenance Plan).

The procedure to identify New York City areas at risk of exceedance of the CO standard identifies one area in downtown Brooklyn and one in Long Island City, where in prior years there were CO exceedances, as still being at risk for CO exceedance. The procedure relies on monitoring of vehicle miles traveled (VMT), which is done on a county-wide basis, as a predictor, as well as on other traffic studies, and on review of plans for development. The City will identify areas where there is expected to be significant new development or redevelopment in the next three to five years, and if the total construction in such an area exceeds recent construction by at least 20%, that area also will be considered at risk for CO exceedance. This development review process will be repeated every three years. If a

commercial project containing over 300,000 square feet is planned close to an area previously identified as at risk of exceedance, the area will be extended to include the planned development. The information concerning such development will be reviewed on a yearly basis.

This monitoring and modeling program provides no basis for any claim that the sale or development of the Coliseum site violates an emission standard or limitation. Indeed, this specific project's prospective effect on CO levels was individually reviewed in a site specific EIS, and no CO exceedance was projected. In a State court suit in which these same petitioners challenged the adequacy of the EIS, particularly with respect to the evaluation of the project upon traffic and consequent CO levels, the New York State courts held that the EIS complied with SEQRA. Committee For Environmentally Sound Development v. City of New York, supra, 700 NYS2d 694, lv. den. _NY2d_ (April 6, 2000). Such state judicial review is an appropriate means for determining the sufficiency of an EIS evaluation of the potential for CO exceedance resulting from the project. Wilder v. Thomas, supra, 854 F.2d at 616-619. This site specific review, under assumptions which did not contemplate City compliance with the CO NAAQS, was more stringent than the measures in the proposed maintenance plan, which is not in effect unless and until approved by EPA, which assume that the City is in compliance with the CO standard, and which seek to maintain compliance with that standard. Furthermore, even under the proposed new Maintenance Plan, a site specific EIS will continue to be relied upon to determine whether a specific project presents a risk of a CO exceedance (Maintenance Plan, p. 20). The provisions in the proposed

Maintenance Plan to designate areas of New York City for monitoring and modeling attention have no bearing on the issue of whether this specific Coliseum project proposal presents any potential for a CO exceedance, (and the site specific EIS found no such potential). This proposed procedure to identify areas of the City for monitoring and modeling attention provides no basis to enjoin this project, even if these provisions were presently in effect. There is nothing either in the proposed Maintenance Plan or the currently applicable SIP which provides a basis to enjoin construction of the building simply because the building may attract increased vehicular traffic. As noted by the District Court, the CAA specifically provides (42 U.S.C. § 7602 (z)) that a building is not a stationary source of pollution simply because it may attract vehicular traffic. Village of Oconomoc Lake v. Dayton Hudson Corp., supra, 24 F.3d at 963. Under § 4.4 of the SIP, if the EIS for a proposed project indicates the potential for exceedance of the CO standard either the project sponsor or the City must take steps to mitigate the problem, with the sponsor responsible for mitigating only those conditions caused by the project, not those traffic problems merely identified in the project EIS. Coalition Against Columbus Center, supra, 967 F.2d at 774-775. At most, any required discretionary government approvals for a project could be denied if an EIS indicated the possibility that traffic attracted by the project could cause CO exceed nces for which mitigation could be problematic. The SIP cannot be rewritten to provide for the outright prohibition of construction of a building that may attract increased traffic and thus indirectly increase CO levels. See Delaware Citizens Council for Clean Air v. Davis, supra, 932 F.2d at

266; Plan for Acadia , Inc. v. Anita Associates, supra, 501 F.2d at 392.

Finally, it should be noted that even if petitioners were correct in their claim that the filing of the attainment demonstration, including the proposed maintenance plan with the New York City procedure, activates presently applicable obligations which constitute a basis for a claim under the citizens' suit provision of the CAA, this matter would not warrant review by this Court under the standards of Rule 10 of this Court. Petitioners' claims do not involve any important question of federal law or any possible conflict with any decision of this Court. Although petitioners claim that this matter raises questions concerning the proper application of Rule 12 (b) (6) Fed.R.Civ.P., it is obvious that the meaning and scope of the SIP and related proposals are questions of law for the court, properly addressed on a Rule 12(b) (6) motion. California Public Interest Research Group v. Shell Oil Co, 840 F.Supp. 712, 718, n. 8, (N.D. Cal. 1993), citing Coalition against Columbus Center v. City of New York, supra, 967 F.2d at 771. Petitioners at most allege a misreading of a SIP and of a related procedure applicable only to New York City, thus there is no possibility that the Second Circuit's construction thereof could result in a ruling in conflict with the position of another Circuit. Even if petitioners' allegations were correct, the nature of the claim of error that they assert does not warrant review by this Court. See Ross v. Moffitt, 417 U.S. 600, 616-617 (1974).

For these reasons, this Court is respectfully urged to deny the petition for a writ of certiorari.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: June 9, 2000
New York, New York

Respectfully Submitted,

MICHAEL D. HESS
Corporation Counsel of the
City of New York
Attorney for City Respondents

LEONARD J. KOERNER*
FRANCIS F. CAPUTO,
GEORGE GUTWIRTH,
of Counsel

*Counsel of Record

Supreme Court, U.S.
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No. 99-1814

IN THE

Supreme Court of the United States

COMMITTEE FOR ENVIRONMENTALLY SOUND DEVELOPMENT, INC., *et al.*,

Petitioners,

v.

THE CITY OF NEW YORK, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS THE METROPOLITAN TRANSPORTATION AUTHORITY AND THE TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY

HERBERT TEITELBAUM
Counsel of Record
JUDITH M. GALLENT
IAN A. SHAVITZ
ROBINSON SILVERMAN PEARCE
ARONSOHN & BERMAN LLP
Attorneys for Respondents The Metropolitan Transportation Authority and The Triborough Bridge And Tunnel Authority
1290 Avenue of the Americas
New York, New York 10104
(212) 541-2000

160258

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

PARTIES TO THE PROCEEDING

The Metropolitan Transportation Authority ("MTA"), incorrectly identified in this action as The Metropolitan Transportation *Agency*, is a public authority organized pursuant to the Public Authorities Law of the State of New York. N.Y. Pub. Auth. Law § 1260 *et seq.* (McKinney 1997). The Triborough Bridge and Tunnel Authority ("TBTA"), an affiliate of the MTA, is organized pursuant to Public Authorities Law § 550. N.Y. Pub. Auth. Law § 550 *et seq.* (McKinney 1997). As public authorities, MTA and TBTA do not have parent corporations and do not issue stock.

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STATEMENT OF THE CASE

Respondents MTA and TBTA (together, the "Authority Respondents") submit this brief in opposition to the Petition for A Writ of Certiorari (the "Petition"). Petitioners seek to overturn the judgment of the United States Court of Appeals for the Second Circuit affirming the United States District Court for the Southern District of New York's decision denying petitioners' motion for leave to file a proposed amended complaint in this action (the "Decision"). The proposed amended complaint, the fourth federal complaint offered by petitioners' thus far in this controversy regarding the sale of the New York Coliseum Site ("Site" or "Coliseum")[1], alleges that respondents violated the Clean Air Act ("CAA"), 42 U.S.C. § 7401 *et seq.*, and the New York City Uniform Land Use Review Procedure ("ULURP"), New York City Charter § 197-c.

A. The Clean Air Act

The Clean Air Act establishes a well balanced system of regulation in which the federal government, the states, individual citizens and the courts each have distinct, clearly defined roles. First, the United States Environmental

1. On November 12, 1998, 14 months after commencing their action in the District Court, petitioners filed a companion proceeding in New York State Supreme Court, also seeking to enjoin the sale of the Coliseum on, among other bases, New York State's Environmental Quality Review Act ("SEQRA"), ECL § 8-0101. That proceeding was dismissed by order dated July 20, 1999, and the dismissal was affirmed by the New York State Supreme Court, Appellate Division, First Department on January 11, 2000. By order dated April 6, 2000, the New York Court of Appeals denied petitioners' request for leave to appeal.

Protection Agency ("EPA") adopts "national ambient air quality standards" ("NAAQS") to be met in order to keep air quality at healthful levels. *See* 42 U.S.C. § 7409(b). Next, the states must develop the strategies to achieve and maintain the NAAQS. *See* 42 U.S.C. § 7410. These state-developed strategies, which include both regulatory programs and commitments for state and local action, are incorporated into State Implementation Plans ("SIP"). Once developed by the states, SIPs are submitted for EPA's approval. SIP commitments become federally enforceable under the CAA only after EPA's approval is granted. *See* 42 U.S.C. § 7604(a)(1) and (f)(4).

As part of its CAA responsibilities, EPA designates geographic areas that have not met the NAAQS for a particular pollutant as "nonattainment" for that pollutant. Once a particular area meets the NAAQS for a particular pollutant, a state may request EPA to redesignate that area as in "attainment." *See* 42 U.S.C. § 7407(d)(3)(D). Before EPA may approve the redesignation request, EPA must approve a maintenance plan, simultaneously submitted by the state with its redesignation request, that assures the area will remain in attainment. *See* 42 U.S.C. § 7407(d)(3)(E)(iv).

Section 304(a)(1) of the CAA, 42 U.S.C. § 7604(a)(1), authorizes citizens to bring suit only for alleged violations of "an emission standard or limitation" that is in effect under the CAA or under an approved SIP. *See* 42 U.S.C. §§ 7604(a)(1) and (f). Significant for present purposes, an "emission standard or limitation" contained in a SIP becomes effective only after its approval by the Administrator of EPA. *See* 42 U.S.C. § 7604(f)(4); *see also* 40 C.F.R. § 52.02(b).

B. The New York State SIP

Currently, New York City is designated as "nonattainment" for carbon monoxide ("CO"). In an effort to achieve the CO NAAQS, New York State submitted a SIP to EPA in 1984 that was approved in 1985 (the "1984 SIP"). *See* 40 C.F.R. § 52.1673(a). In 1992, the New York SIP was amended in various respects and was approved by EPA on July 25, 1996. *See* 61 Fed. Reg. 38594. The 1992 SIP, section 4.4, provides in part:

> The State and City commit to develop a broader alternative procedure to identify potential areas at risk of exceedance of the CO standard. . . . This new procedure will become part of the CO maintenance plan which must be submitted at the time that the state requests redesignation of the nonattainment area as an area which has attained the NAAQS for CO.

In August 1999, the New York State Department of Environmental Conservation ("DEC") submitted to EPA a Proposed Carbon Monoxide Redesignation Request and Maintenance Plan for the New York Metropolitan Area ("Proposed Redesignation Request"). In accordance with the 1992 SIP, the Maintenance Plan included a new procedure for identifying potential areas at risk of exceeding the CO standard. To date, the EPA has not acted on the Proposed Redesignation Request or CO Maintenance Plan. Thus, the CO Maintenance Plan is not as yet effective, and will not become part of the New York SIP until it is approved by EPA. *See* 42 U.S.C. § 7505a(c) and 42 U.S.C. §§ 7407 (d)(3)(D) and (E).

REASONS FOR DENYING THE PETITION

I.

THE COURT SHOULD DENY THE PETITION BECAUSE THE PROPOSED AMENDED COMPLAINT FAILS TO STATE A CLAIM ON WHICH RELIEF MAY BE GRANTED

Petitioners' request that the Court grant the Petition is predicated on its assertion that the Court of Appeals, in affirming the District Court's denial of the motion for leave to file the proposed amended complaint, ignored an "intervening change in the underlying facts and law" that supplied a basis for the proposed fourth claim for relief. Petition at 12. As described below, petitioners' assertion, correctly rejected by the Court of Appeals, is based on a misreading of the 1992 SIP and a misunderstanding of the process pursuant to which SIP submissions become enforceable under the CAA's citizen suit provisions.

The proposed amended complaint's fourth claim alleged that respondents violated SIP section 4.4 by failing to "develop a broader alternative procedure to identify potential areas at risk of exceedance of the CO Standard." Joint Appendix ("JA") at A-162. As the Court of Appeals correctly explained, however, section 4.4. requires that the City and State develop and submit a "broader procedure" for identifying areas at risk of CO exceedance at the time the state submits its redesignation request to EPA, an event which had not yet occurred at the time petitioners moved to interpose the proposed fourth claim. *See* Petition at A.6a. Because the claim was premature, the Court of Appeals held it was properly dismissed by the District Court.

In August 1999, DEC, in accordance with its obligations under section 4.4, submitted to EPA a Proposed Carbon Monoxide Redesignation Request and Maintenance Plan for the New York Metropolitan Area. Petitioners contend here, as they did at oral argument before the Court of Appeals and in their subsequent petition for panel rehearing, that the August 1999 submission " 'triggered' the broader procedure for evaluation of potential hot spots." Petition at 5; *see also* Petition at 6, 11, 12. Hence, petitioners argue that the proposed fourth claim is ripe for review. Petitioners' contention is simply wrong.

The 1992 SIP only obligated the State and City to "develop" the broader procedure. Nowhere does the 1992 SIP state, as petitioners contend, that the mere *filing* of the Redesignation Request triggers the obligation to implement the broader review procedure for projects such as the redevelopment of the Coliseum. Nor could it. As petitioners concede, this future obligation to conduct a broader review does not ripen into an enforceable "emission standard or limitation" under sections 7604(a)(1) and (f)(3) until the Redesignation Request, including the Maintenance Plan, is approved by EPA as part of the SIP. *See* Petition at 11; 42 U.S.C. § 7407 (d)(3)(D) and § 7604(f)(4); *see also* 40 C.F.R. § 52.02(b).

New York's August 1999 submission, however, has not received the requisite EPA approval.[2] Until that happens, the

2. Apart from its other defects, petitioners' argument is an improper attempt to alter the proposed fourth claim. Petitioners alleged in the proposed amended complaint that "Defendants violated two specific strategies set forth in . . . the SIP [including] Section 4.4 [which] commits the City to *develop* a broader alternative procedure to identify potential areas at risk of exceedance of the CO standard." JA at A-162 (emphasis added). The record

(Cont'd)

obligations contained in the Maintenance Plan for the New York Metropolitan Area are *proposals* for EPA review, not "standards or limitations" enforceable under the CAA. Accordingly, the Court of Appeals correctly determined that presently, the City and State are under no federal, or, for that matter, state obligation to implement the proposed broader procedure.[3]

In sum, Petitioners' proposed fourth claim has no basis in the 1992 SIP, and, to the extent it is premised upon a commitment contained in the 1999 CO Maintenance Plan submission, the proposed claim remains premature.[4] For these reasons, the Court of Appeals' denial of the petition for panel rehearing was proper in all respects and does not merit this Court's review.

(Cont'd)
demonstrates that this claim is meritless because New York City and New York State have, in fact, developed this alternative procedure. *See* Respondents' Lodging Appendix ("RA") at 20 and Appendix D (submitted to the Court of Appeals pursuant to Federal Rule of Appellate Procedure 28(j)). Petitioners now attempt to change the proposed fourth claim's substance by arguing that respondents have violated the SIP by failing to *implement* the broader procedure with respect to the Coliseum redevelopment. This new claim, nowhere alleged in the proposed amended complaint nor adjudicated below, is not a proper basis for the Petition. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976) (citing *Hormel v. Helvering*, 312 U.S. 552, 556 (1941)).

3. However, air quality related impacts of the project were studied in a full Environmental Impact Statement pursuant to SEQRA, ECL § 8-0109, as required by section 4.4 of the 1992 SIP.

4. The Court of Appeals expressed "no view on whether that [premature] claim may be brought at some later date." Petition at A.6a.

II.

THE COURT SHOULD DENY THE PETITION BECAUSE THE PETITION DOES NOT RAISE ANY ISSUE THAT MERITS THIS COURT'S REVIEW

Even if the proposed fourth claim were ripe for review, which, as explained in Point I, it is not, the petition should be denied because no arguments are raised that merit this Court's review. Supreme Court Rule 10 provides that "[a] petition for a writ of certiorari will be granted only for compelling reasons." Among the factors considered by the Court in the disposition of such petitions is that a "United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." Supreme Court Rule 10(c). A petition for writ of certiorari is "rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Applying these standards, it is apparent that the Petition should be denied.

Petitioners advance three arguments in support of their request that the Court grant the Petition, each of which is unavailing. First, they assert that, in dismissing the proposed fourth claim, the Court of Appeals violated this Court's "directive regarding liberal pleading and reluctance to dismiss complaints." Petition at 10. Even if true, such a claim does not merit this Court's review because it is merely a disagreement with the Court of Appeals' application of an uncontroverted and uncontroversial principle of law to a particular set of facts. A narrowly circumscribed issue of this sort, lacking significance beyond this case's factual context, does not merit this Court's review.

Second, petitioners allege that although the Court of Appeals recited correctly that it must review *de novo* the District Court's dismissal of the proposed amended complaint, it failed to apply that standard in reviewing the adequacy of the proposed fourth claim. *See id.* Assuming *arguendo* that petitioners are correct, their argument is nothing more than a claim that the Court of Appeals misapplied a properly stated rule of law. Under these circumstances, this Court's review is unwarranted. *See* Supreme Court Rule 10.[5]

Third, petitioners argue that the Court should grant the Petition because the Court of Appeals improperly concluded that section 4.4 of the SIP does not presently provide a valid basis for a CAA citizen suit. *See* Petition at 13. Even if true (which, as demonstrated in Point I, it is not), this argument involves the interpretation of a single provision of a single state's SIP that applies exclusively to development projects in New York City. As such, it does not present an issue of wide applicability with significance beyond this case's narrow context. This fact-specific issue is of limited import and does not merit this Court's review. *See* Supreme Court Rule 10; *see also Watt v. Alaska*, 451 U.S. 259, 276 n.5 (1981) (Stevens, J., concurring) ("our certiorari jurisdiction is designed to serve purposes broader than the correction of error").

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5. Moreover, there is no basis in the Court of Appeals' opinion for petitioners' assertion that the Court of Appeals failed to review the proposed fourth claim *de novo*. Petitioners point to the Court's dismissal of the proposed amended complaint for " 'substantially the same reasons stated in the [district court] opinion . . .' " Petition at 12 (quoting A.6a). However, simply because the Court of Appeals agreed with the District Court's reasoning does not mean that the Court of Appeals failed to assess the adequacy of the petitioners' claims *de novo*.

CONCLUSION

The Court should deny the Petition because, as the Court of Appeals correctly determined, the proposed amended complaint fails to state a claim on which relief may be granted, and the issues raised in the Petition otherwise do not merit this Court's review.

Respectfully submitted,

HERBERT TEITELBAUM
Counsel of Record
JUDITH M. GALLENT
IAN A. SHAVITZ
ROBINSON SILVERMAN PEARCE
ARONSOHN & BERMAN LLP
Attorneys for Authority Respondents
1290 Avenue of the Americas
New York, New York 10104
(212) 541-2000